BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DONALD F. TAYLOR Claimant	)	
VS.	)	
STATE OF KANSAS Respondent	)	Docket No. 1,034,882
AND	)	
STATE SELF INSURANCE FUND Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the December 21, 2009, Award entered by Administrative Law Judge Rebecca A. Sanders. The Board heard oral argument on April 6, 2010. Judy A. Pope, of Leawood, Kansas, appeared for claimant. Cory V. Sheedy, of Topeka, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant's back injury was not a natural and probable consequence of his previous ankle injury but was the result of a new and separate injury. The ALJ further found that claimant was permanently totally disabled.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent is not denying that claimant suffered an injury to his back. The respondent contends, however, that claimant's back injury was the result of a previous work-related accident that occurred in 1995 and was not the result of a new and separate accident.

Claimant argues that he suffered a new and distinct back injury which was not a natural or probable consequence of his 1995 injury.

The issue for the Board's review is: Was claimant's injury a natural and probable consequence of his 1995 accident or a new and separate accident?

FINDINGS OF FACT

Claimant testified that he has worked for the Kansas Department of Health and Environment (KDHE) since 1987. In 1995, he injured his right ankle when he worked in the field. Claimant testified that he had an altered gait or limp for a period of time after his ankle injury. He testified that he had surgery in 2001 and quit limping after that surgery, except for times when his ankle became stressed.

As a result of claimant's ankle injury, respondent moved him to a desk job. His job required him to sit at a desk, answer a telephone and use a computer. He was required to stay within hearing distance of his phone, and he was reprimanded by his employer for moving away from his desk. He testified that he was required to sit all day, except when he took his 15-minute breaks and at lunchtime.

Claimant said that in 2000, the KDHE moved offices. After the move, his desk top was set too low, making his computer sit too low. Claimant is six foot three inches tall, and he had to bend over to use his computer. Further, claimant stated he used a broken chair until it was replaced in 2006. Over time, he began having low back problems. By 2006, the pain had gotten so bad that claimant asked respondent to see a doctor. At some point after he reported his back pain, an ergonomic study was done of his work area, and he was told that his desk height needed to be adjusted. Claimant said that even after his chair was replaced and the height of his desktop was adjusted, he was still required to sit for long periods of time, and his back continued to worsen. Claimant testified at the regular hearing that he continues to have a hard time sitting for even short periods of time.

Claimant was referred by respondent to Dr. Vito Carabetta for treatment of his back condition. He was first seen by Dr. Carabetta on January 3, 2007, at which time Dr. Carabetta diagnosed him with lumbar radiculopathy affecting the right side. He saw Dr. Carabetta again on October 4, 2007 and August 13, 2008. Claimant's condition continued to worsen. The last time Dr. Carabetta saw claimant, he was still working a desk job full time.

When claimant saw Dr. Carabetta initially in January 2007, he thought his back pain could be connected to his ankle injury. Dr. Carabetta said some people with an ankle problem can develop a limped gait pattern which can cause mechanical back pain. But it would not cause abnormal neurologic findings. Dr. Carabetta said claimant had extensive degenerative changes that were causing compression on one of his nerve roots, causing radiculopathy. Dr. Carabetta said a chronic limp would not be expected to cause the

specific degenerative changes claimant had and would not be expected to cause radiculopathy. Dr. Carabetta said he could not attribute claimant's lumbar radiculopathy to his ankle injury and concluded it was a new, separate concern. He opined that the body mechanics required for claimant to work at a desktop that was too low for his height and sit in a broken chair would be a contributing factor to claimant's condition. He also said that claimant had some underlying arthritic changes and that his history of working in a position where the ergonomics were poor appeared to be the leading factor in the aggravation of his underlying condition.

Dr. Douglas Burton, a board certified orthopedic surgeon, was authorized by respondent to treat claimant. He first saw claimant on April 22, 2008. He ordered an MRI, which showed that claimant had a mild degenerative disk at L4-5. He restricted claimant's lifting to 25 pounds and limited his work day to 6 1/2 hours with a sit/stand option.

In Dr. Burton's May 7, 2009, report, he said that claimant was at maximum medical improvement. Dr. Burton gave him a permanent work restriction in the sedentary category, which has a 10-pound lifting restriction. Using the AMA *Guides*,[1] Dr. Burton rated claimant as having a 10 percent permanent partial impairment to the whole body.

At his deposition, Dr. Burton stated that it was medically possible for an ankle injury to alter someone's gait, and it was also medically possible for an altered gait to cause back pain. Dr. Burton testified, however, that he was not asked to ascertain the cause of claimant's back pain and gave no opinion on that subject.

Dr. Lizhao Wang, a clinical neuropsychologist, saw claimant as a patient. Claimant had been referred by his authorized treating physician, Dr. Warren, to test claimant for cognitive deficiencies and emotional problems. After testing, Dr. Wang found that claimant had significant cognitive impairment, probably secondary to chronic pain, depression, side effects of pain medication, and chronic mental fatigue from insomnia. He also concluded that claimant had chronic pain syndrome and depressive disorder. Dr. Wang believed that claimant's cognitive deficits and depression will be long lasting.

Dick Santner, a vocational rehabilitation counselor, met with claimant on June 30, 2009. He prepared a list of eight job tasks claimant performed in the 15-year period before claimant's date of injury, which he was told was January 25, 2007. Dr. Carabetta, the only physician to offer a task loss opinion, stated that of the eight tasks on the list, claimant could not perform seven. The remaining task, that of administering tests to contractors, Dr. Carabetta was uncertain as to whether claimant could perform and said it would depend on the length of the test.

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Mr. Santner's report also lists three jobs he believed claimant could perform within his restrictions. However, at his deposition and after reviewing the report of Dr. Wang, Mr. Santner stated he did not believe claimant would be able to perform any of those three jobs. Dr. Wang also opined that claimant would be unable to perform those three jobs. Dr. Carabetta testified that claimant's cognitive issues and restrictions would have a negative impact on claimant's ability to retain gainful employment.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[2] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[3]

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[4] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[5]

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson,*[6] the court held:

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[2] K.S.A. 2009 Supp. 44-501(a).

[3] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[4] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374,Syl. ¶ 1, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, Syl. ¶ 4, 547 P.2d 751 (1976)*; Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 336, 678 P.2d 178 (1984).

[5] *Hanson v. Logan U.S.D. 326*, 28 Kan. App.2d 92, Syl. ¶ 3, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[6] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman,*[7] the court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig,*[8] the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber,*[9] the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."[10]

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[7] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[8] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[9] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[10] *Id.* at 728.

In *Logsdon*,[11] the Kansas Court of Appeals reiterated the rules found in *Jackson* and *Gillig*:

> Whether an injury is a natural and probable result of previous injuries is generally a fact question.
>
> When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.
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> When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

ANALYSIS

Claimant's ankle injury occurred in 1995. Thereafter, he did walk with a limp or altered gait for a period of time. Following his surgery in 2001, however, claimant's limp was gone most of the time. Claimant would occasionally have a limp when his ankle would become stressed. The medical evidence does not support there being a causal connection between claimant's ankle injury and resulting limp and the back injury which is the subject matter of this claim. Furthermore, claimant primarily developed the back symptoms after his ankle surgery and during a time when he was not walking with an altered gait. The back injury resulted from prolonged sitting and bending while sitting, not from walking.

Respondent argues that the back injury occurred as a natural consequence of the ankle injury because claimant's job, which required prolonged sitting and bending at his desk, was an accommodation that respondent provided because of restrictions from the ankle injury. As such, had claimant not suffered the ankle injury, he would not have suffered the back injury. Stated another way, the back injury would not have occurred but for the ankle injury. Therefore, the back injury occurred as a natural consequence of the ankle injury.

The Board does not consider the natural and probable consequence rule to extend as far as respondent would have us find in this case. Rather, the Board believes the rule requires that there be a medical or physiological connection between the original injury and the subsequent injury. For example, in this case, if the ankle injury resulted in an altered gait which then resulted in mechanical back pain and injury, then the natural consequence rule would apply. But because the back injury was caused by a defective chair, an

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[11] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006); see also *Leitzke v. Tru-Circle Aerospace*, No. 98,463, unpublished Court of Appeals opinion filed June 6, 2008.

improperly positioned and non-ergonomically correct work station, together with a job that required prolonged sitting and bending forward, the Board finds that the connection between the desk job and the ankle injury is too tenuous. Therefore, the Board concludes that the back injury was not the direct result or natural consequence of the ankle injury.

CONCLUSION

Claimant's back injury is compensable as a new and separate accident and not as a direct, natural and probable consequence of his prior ankle injury.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated December 21, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Judy A. Pope, Attorney for Claimant
Cory V. Sheedy, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge